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Third Circuit Confirms the Class Arbitration "Clear and Unmistakable" Standard in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, Dealing a Blow to Consumers and Employees

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THIRD CIRCUIT CONFIRMS THE CLASS ARBITRATION “CLEAR AND UNMISTAKABLE” STANDARD IN *CHESAPEAKE APPALACHIA, LLC v. SCOUT PETROLEUM, LLC*, DEALING A BLOW TO CONSUMERS AND EMPLOYEES

Abstract: Whether class action is available in an arbitration proceeding is a highly controversial topic with implications for all parties bound by such clauses. Due to the high stakes of class action arbitrability, it is essential that a neutral decisionmaker determine this question. Whether this decisionmaker is the court or the arbitrator, however, is contested and unresolved by the U.S. Supreme Court. Although undetermined by our highest court, the U.S. Court of Appeals for the Third Circuit has addressed this question. In *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, the Third Circuit affirmed that the availability of class arbitration is a question for the courts, unless there is clear and unmistakable language within the arbitration clause delegating such a power to the arbitrators. Further, the court held that an incorporation of the American Arbitration Association rules is not a clear and unmistakable delegation. Although this opinion incentivizes contract clarity, it also ignores the uneven bargaining power and divergent interests between parties in modern mandatory arbitration agreements, handing a windfall victory for corporations.

INTRODUCTION

American citizens are currently entwined in tens of millions of contracts that contain arbitration clauses.¹ Arbitration agreements, prevalent in credit card, employment, and student loan contracts, strip the court of jurisdiction over disputes arising out of a contract and require such disputes to be heard before a panel of neutral arbiters.² Although arbitration is becoming an in-

¹ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 1.4.1, at 9 (2015); see Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 [<https://perma.cc/LVG7-H4Z6>].

² See CONSUMER FIN. PROT. BUREAU, *supra* note 1, § 1.4.1, at 10; Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329, 336 (2015) (highlighting the wide breadth of industries that adopt arbitration clauses); Silver-Greenberg & Gebeloff, *supra* note 1 (highlighting that arbitration agreements are found in many different types of contracts).

creasingly popular method of dispute resolution, the system has recently come under fire for its stifling impediments on class action claims.³ Many arbitration clauses either preclude, or are silent on, class action.⁴ These restrictions have been challenged in court; however, many of the judicial branch's decisions have benefited companies and employers by either upholding class action waivers or concluding that class arbitration is not available when not explicitly provided for in a contract.⁵ Without the ability to bring class claims, many otherwise aggrieved persons have been unable or unwilling to bring claims against large companies due to the impracticalities of bilateral dispute resolution.⁶ As a consequence, companies that use such clauses, such as Verizon, AT&T, and American Express have saved millions, if not billions, of dollars to the detriment of the average citizen.⁷

Class action arbitration is a complex topic defined by clashing legal policies: the purpose of arbitration is economic and procedural efficiency, but class

³ See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 125–26 (2002) (arguing that class action impediments as a result of arbitration agreements deprive plaintiff's statutory rights); Silver-Greenberg & Gebeloff, *supra* note 1 (detailing how many consumers and employees are finding themselves unable to redress claims against companies because they are precluded from class arbitration). See generally Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012) (providing the statutory authority to arbitrate disputes).

⁴ See *Opalinski v. Robert Half Int'l Inc.* (*Opalinski I*), No. 10-CV-2069, 2011 WL 4729009, at *3 (D.N.J. Oct. 6, 2011) (stating that the arbitration agreements were silent on the matter of class action); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 884 (highlighting the omnipresence of class action waivers in consumer arbitration agreements); *infra* notes 38–52 and accompanying text (discussing how silence in a class action waiver often results in parties being precluded from the procedure).

⁵ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311–12 (2013) (holding that the Federal Arbitration Act (“FAA”) does not allow courts to invalidate a class action arbitration waiver on the grounds that the plaintiff's cost of individually arbitrating a claim outweighs the possible recovery); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343–44 (2011) (holding that California's common law unconscionability doctrine is preempted by the FAA); *Stolt-Nielsen S.A. v. Animal-Feeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (stating that parties cannot be forced to arbitrate through a class unless there is a contractual basis that the parties agreed to do so); Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 272–75 (2013) (explaining how the judicial branch has adopted a broad reading of the FAA so that the statute preempts states from regulation arbitration).

⁶ See Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Prepared Remarks at Arbitration Field Hearing (Mar. 10, 2015), <http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-field-hearing-arbitration-clauses/> [<https://perma.cc/3FLT-DF3C>] (stating that many consumers do not think it is rational to try and hire a lawyer to argue a small fee); Byron Allyn Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 HOUS. L. REV. 215, 247–48 (2008) (discussing the high costs and low rewards of bilateral arbitration). Specifically, in the consumer realm, a mere 616 arbitration cases are filed with the American Arbitration Association (“AAA”) each year. CONSUMER FIN. PROT. BUREAU, *supra* note 1, § 1.4.3, at 11.

⁷ Rice, *supra* note 6, at 248; Silver-Greenberg & Gebeloff, *supra* note 1.

action's paramount concern is the protection of individual rights.⁸ Thus, parties in a contractual agreement often have starkly different opinions about whether class action should be available under valid arbitration agreements.⁹ This Comment discusses one facet of this debate: the availability of class action when an arbitration clause is silent on the matter.¹⁰ Part I of this Comment discusses background federal arbitration law and class action arbitration.¹¹ Part II discusses two decisions of the U.S. Court of Appeals for the Third Circuit that categorized the availability of class action as a question of arbitrability.¹² Part III explains how the Third Circuit's decisions have further restricted the ability of parties to bring class action claims due to uneven bargaining power between companies and consumers.¹³

I. THE FEDERAL ARBITRATION ACT AND CLASS CLAIMS

Although arbitration is becoming commonplace in a diverse set of contracts, its statutory foundation and policy implications are widely debated.¹⁴

⁸ See *Concepcion*, 563 U.S. at 344 (explaining that class action hinders the fundamental benefits of arbitration—speed and informality—and thus is inconsistent with the FAA); Sternlight, *supra* note 3, at 8, 29–31 (highlighting that arbitration is commended for being a fast and cheap procedure, whereas class action is recognized for improving access to courts and enhancing the public interest). In other words, an arbitration proceeding focuses on resolving the dispute at hand in the most efficient, often private, way possible. See Sternlight, *supra* note 3, at 8 (discussing why businesses prefer arbitration). A class action lawsuit, however, is more public, can take years to conclude, and often has public policy in mind. See *id.* at 29–31, 30 n.102; *About Class Actions*, SPECTOR ROSEMAN KODROFF & WILLIS, <http://www.srkw-law.com/about-class-actions.html> [<https://perma.cc/7NVT-UCXB>] (stating that class action lawsuits often take two to four years). Thus, the goals of arbitration and class action are often incompatible. See Sternlight, *supra* note 3, at 8, 29–31 (discussing the goals of arbitration and class action).

⁹ See *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC (Chesapeake III)*, 809 F.3d 746, 751 (3d Cir. 2016) (highlighting how the lessee, Chesapeake, did not believe class action was valid, whereas the lessor, Scout Petroleum, argued class action was an available avenue of redress); Wade Lambert, *Class-Action Suit Is a Target for Criticism from All Sides*, WALL ST. J. (Apr. 19, 1996), <https://www.wsj.com/articles/SB829877425363143500> [<https://perma.cc/R3SP-LF53>] (comparing the views of critics and advocates of class action; critics claim it is a method for lawyers to bring frivolous lawsuits, whereas advocates argue it is a vital method protecting consumer and employee rights).

¹⁰ See *infra* notes 14–122 and accompanying text. Another facet of this debate is the use of class action waivers in arbitration agreements. See generally Joseph Fay et al., *Class Action Waivers in Arbitration Provisions*, in A PRACTITIONER'S GUIDE TO CLASS ACTIONS 575 (Marcy Hogan Greer ed., 2010) (providing a general summary of class action waivers in arbitration agreements). Although this Comment does not focus on class action waivers, the topic is sporadically referred to throughout the work. See generally Matthew Harris, Comment, *Riding the Waiver: In re American Express Merchants' Litigation and the Future of Vindication of Statutory Rights*, 54 B.C. L. REV. E. SUPP. 15 (2013), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3282&context=bclr> [<https://perma.cc/7T4B-6DEU>] (discussing class action waivers and their implications on statutory rights).

¹¹ See *infra* notes 14–52 and accompanying text.

¹² See *infra* notes 53–95 and accompanying text.

¹³ See *infra* notes 96–122 and accompanying text.

¹⁴ See *Chesapeake III*, 809 F.3d at 753; Silver-Greenberg & Gebeloff, *supra* note 1 (detailing the types of consumer contracts that have arbitration contracts). Compare *Concepcion*, 563 U.S. at 339

Section A of this Part provides a brief introduction to the foundation of arbitration and an overview of the court's attempts to balance the system's competing policies.¹⁵ Section B discusses class action and its role in the judicial system.¹⁶ Section C highlights the uncertain role of class action in arbitration proceedings, and how federal courts have addressed the matter.¹⁷

A. Arbitration: A Balancing Act

The Federal Arbitration Act ("FAA"), which places arbitration agreements on an equal footing with other contracts, continues to be a contested piece of legislation with far-reaching implications.¹⁸ Much of the controversy surrounding the FAA has stemmed from the necessity to balance the goals of arbitration with the need for fair resolution of claims.¹⁹ On one hand, arbitration is an efficient, inexpensive method of resolving disputes, as it reduces procedure and preserves the judicial branch's scarce resources.²⁰ On the other hand, arbitration precludes parties from a jury trial and appellate review, which can lead to a lack of legitimacy and due process.²¹ Consequently, the U.S. Supreme Court has tried to interpret the FAA in a way that gives autonomy to the arbitration system while still permitting courts to intervene when legal rights may be at risk.²² Accordingly, courts retain jurisdiction over gateway issues, such as

(highlighting a broad interpretation of the FAA), *with id.* at 359 (Breyer, J., dissenting) (interpreting the FAA more narrowly). *See generally* Sternlight, *supra* note 3 (discussing the debate of arbitration clauses and class action).

¹⁵ *See infra* notes 18–27 and accompanying text.

¹⁶ *See infra* notes 28–37 and accompanying text.

¹⁷ *See infra* notes 38–52 and accompanying text.

¹⁸ 9 U.S.C. §§ 1–16 (2012); *see Chesapeake III*, 809 F.3d at 753 (discussing the disagreement over whether class action arbitrability is a question of procedure or arbitrability). *Compare Concepcion*, 563 U.S. at 339 (highlighting a broad interpretation of the FAA), *with id.* at 359 (Breyer, J., dissenting) (interpreting the FAA more narrowly), and *Silver-Greenberg & Gebeloff*, *supra* note 1 (detailing the types of consumer contracts that have arbitration contracts). *See generally* Sternlight, *supra* note 3 (discussing the debate of arbitration clauses and class action).

¹⁹ *See* Thomas Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT'L ARB. 213, 221 (2005) (highlighting the questions a court faces when regulating arbitration, as the regulations should promote both effective adjudication and the protection of legal rights); Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 249–50 (1987) (discussing tensions between the public and private interests in an arbitration proceeding).

²⁰ *See* Kanowitz, *supra* note 19, at 296 (discussing the attributes of arbitration); Sternlight, *supra* note 3, at 56 (stating that many commentators believe arbitration is efficient and generally accepted).

²¹ *See* Barnes, *supra* note 2, at 329 (stating that arbitration prevents people from getting their day in court); Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 20–21 (2003) (explaining that the lack of a jury trial in arbitration is worrisome).

²² *See Concepcion*, 563 U.S. at 339 (explaining that there is generally a liberal policy favoring arbitration, but such clauses will be rendered unenforceable upon grounds of law or equity).

questions of an arbitration agreement's scope, whereas arbitrators are tasked with deciding all else, including questions of procedure.²³

Whether a court or arbitrator decides a matter can have a range of implications for a claim's outcome: courts are governed by legal doctrine whereas arbitrators have the flexibility to craft equitable solutions not based on judicial precedent.²⁴ This distinction means that parties may be deeply invested in whether a matter is categorized as a gateway question, known as a question of arbitrability, or a question of procedure.²⁵

Because a growing number of companies include arbitration clauses in their contracts, deciding what is a question of arbitrability, and thus within the

²³ See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002) (highlighting the distinctions between questions of arbitrability and procedure); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (holding that the question of arbitrability depends on whether the parties agreed to submit questions to arbitration). Questions of arbitrability are fundamental gateway questions concerning whether parties have agreed to arbitrate an issue's merits. *Howsam*, 537 U.S. at 83–84. Specifically, questions of arbitrability include questions of the arbitration agreement's scope, whether the arbitration agreement violates law or equity, or where a party asserts a federal statutory claim and Congress has demonstrated a clear intent that the statutory claim not be arbitrated. *Id.* at 84; see P. CHRISTINE DERUELLE & COREY BERMAN, WEIL, *THE FUTURE OF CLASS ACTION ARBITRATION 2* (July 23, 2013), http://www.weil.com/~media/files/pdfs/Weil_Summer_2013_Class_Action_Monitor.pdf [<https://perma.cc/K8AW-QMAB>] (discussing the question of arbitrability). Procedural questions are ones that “grow out of the dispute and bear on its final disposition.” *Howsam*, 537 U.S. at 84 (quoting *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). Specifically, this can include allegations of waivers and delays. See *id.* (defining procedural questions in arbitration agreements).

²⁴ See *Keebler Co. v. Truck Drivers, Local 170*, 247 F.3d 8, 11–12 (1st Cir. 2001) (upholding an arbitration decision where the arbiter imposed an unconventional, flexible solution); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1990) (stating that “arbitrators, unlike judges, are not bound to use substantive law”); W. Mark C. Weidemaier, *Arbitration and the Individual Critique*, 49 ARIZ. L. REV. 69, 95–96 (2007) (finding that arbiters have more flexibility than judges when coming to a solution); *Where Flexibility Meets Cost Efficiency in Settling Disputes*, SOUTH CHINA MORNING POST (Apr. 24, 2013), available at http://www.kslaw.com/imageserver/KSPublic/library/publication/2013articles/4-24-13SCMP_Berger.pdf [<https://perma.cc/L75T-CLCC>]. Specifically, a court's principal concern must be statutory and case law, whereas arbitrators are not governed by legal precedent. Brunet, *supra*, at 85; *Where Flexibility Meets Cost Efficiency in Settling Disputes*, *supra*. Thus, arbitrators may take into account fairness or equity if they believe it provides the best commercial solution, even if it is contrary to court precedent. See *Keebler Co.*, 247 F.3d at 11–12 (explaining that it was in the arbiter's power to use a higher standard of proof than that used by the court); Brunet, *supra*, at 85 (stating that arbiters can craft solutions as they see fit). Consequently, whether a court or arbitrator has the power to decide a matter could affect the final outcome of the case. See *Keebler Co.*, 247 F.3d at 11–12 (expressing skepticism at the standard of proof used by the arbitration panel, but nonetheless upholding its decision); Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 49 (1998) (finding that employees were generally more victorious in arbitration than in court). For example, one study found that in a similar time period, employee-plaintiffs were 63% victorious in arbitrations, but only victorious 14.9% of the time in federal district courts. Maltby, *supra*, at 49.

²⁵ See Maltby, *supra* note 24, at 49 (finding that whether a matter is decided before a court or an arbitration panel may be outcome determinative); *Where Flexibility Meets Cost Efficiency in Settling Disputes*, *supra* note 24 (discussing the different factors courts and arbitrators weigh when deciding a matter).

court's realm, is becoming increasingly complicated.²⁶ Recently, the availability of class arbitration is one such area where the question of arbitrability has been contested, affecting employees, consumers, and others who are parties to arbitration agreements.²⁷

B. Class Action Implications

The Federal Rules of Civil Procedure ("FRCP") allow a plaintiff to file a lawsuit on behalf of a larger class if all individuals suffered the same wrong at the hands of the defendant.²⁸ This type of lawsuit, known as a class action suit, not only saves the court from hearing possibly hundreds or thousands of the same or substantially similar claims, but also provides plaintiffs and lawyers an incentive to wage a legal battle where there is widespread harm.²⁹ Thus, the procedure serves as an equalizer in the litigation system, as individuals who would otherwise be powerless against larger opponents have an opportunity to vindicate their rights.³⁰

Although benefits to class action plaintiffs are debated, class action serves an important check on companies' practices and can serve as an impetus for

²⁶ See *Chesapeake III*, 809 F.3d at 753 (highlighting the question of arbitrability debate); *Opalinski v. Robert Half Int'l Inc. (Opalinski III)*, 761 F.3d 329, 331 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015) (discussing the court's struggles in deciding whether class action availability is a question of arbitrability); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 597 (6th Cir. 2013) (stating that the court must decide whether class arbitration is a question of arbitrability or procedure); see also Ashby Jones, *Has Arbitration Become More Burdensome Than Litigation?*, WALL ST. J. (Sept. 1, 2010), <http://blogs.wsj.com/law/2010/09/01/has-arbitration-become-worse-than-litigation/> [<https://perma.cc/N9EZ-W23D>] (discussing the increasing complexities in arbitration, a system that is meant to promote procedural and economic efficiency).

²⁷ See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (plurality opinion) (highlighting that a contract's silence on class action availability poses a problem for the courts); *Chesapeake III*, 809 F.3d at 753 (demonstrating the differing opinions of class action arbitration); *Opalinski III*, 761 F.3d at 331–32 (exemplifying the class action arbitration debate). See generally Deruelle & Berman, *supra* note 23 (providing an overview of class action availability in arbitration agreements).

²⁸ See FED. R. CIV. P. 23; Barnes, *supra* note 2, at 331–33 (explaining the historical context of Rule 23 and its importance in vindicating individuals' rights).

²⁹ See *Amchen Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)) (explaining the importance of class action in small recovery claims); Barnes, *supra* note 2, at 333 (stating that there is little incentive to litigate small claims without arbitration). This is especially true for small recovery claims. See *Amchen*, 521 U.S. at 617. When the recovery is small and the litigation costly, there is little incentive for a plaintiff to initiate litigation, or for an attorney to take the case. *Id.* Class action, however, aggregates the small recoveries into a much larger recovery. *Id.* But see Lambert, *supra* note 9 (discussing negative views of class action, such as it being a method that facilitates lawyers bringing frivolous lawsuits and being rewarded with a big settlement fee).

³⁰ See *Amchen*, 521 U.S. at 617 (finding that class action is important when fighting against small claims); Barnes, *supra* note 2, at 333 (stating that individuals often do not have the resources to fight claims alone).

policy change in the workplace.³¹ First, class action is a restraint on companies because it serves as deterrence against illegal activity.³² When companies believe that they can be exposed to class action lawsuits, there is evidence that they invest in compliance to assure that they are monitoring potentially unlawful activities.³³ Consequently, immunity from class action suits diminishes this emphasis on compliance, which can lead to unlawful activities and harm against consumers.³⁴ Further, class action is an important way in which systemic and discriminatory issues are addressed.³⁵ After a successful class action suit, a company may be forced to change a policy or may make policy changes on its own to assuage negative attention.³⁶ Thus, class action serves a number of interests and has been an important avenue of redress for individuals pitted against more formidable opponents.³⁷

³¹ See Arbitration Agreements, 81 Fed. Reg. 32,830, 32,862–63 (May 24, 2016) (to be codified at 12 C.F.R. pt. 1040) (finding that class action is an incentive to comply with the law); Mark Bolin, Comment, *Fear and Loathing of Class Action Arbitration, or How to Dismiss the Effective Vindication Doctrine*, 47 LOY. L.A. L. REV. 563, 576 (2014) (explaining that class action lawsuits are an important private cause of action that serve as a deterrent against anticompetitive conduct); *Fresh Air: Have We Lost a Constitutional Right in the Fine Print?*, NAT'L PUB. RADIO (Nov. 12, 2015), <http://www.npr.org/2015/11/12/455749456/have-we-lost-a-constitutional-right-in-the-fine-print> [<https://perma.cc/S884-P7BE>] [hereinafter *Fresh Air*] (statement of Jessica Silver-Greenberg) (explaining that class action is a powerful way in which workplace discrimination issues are addressed).

³² See Arbitration Agreements, 81 Fed. Reg. at 32,862–63 (stating companies are more likely to comply with the law when there is the potential for a class action lawsuit); Barnes, *supra* note 2, at 333 (highlighting the important interest class action serves regarding deterrence); Bolin, *supra* note 31, at 576 (discussing how class action promotes deterrence).

³³ See Arbitration Agreements, 81 Fed. Reg. at 32,862 (finding that companies monitor class litigation so that they can limit their liability). The Consumer Financial Protection Bureau (“CFPB”) highlighted there has been a renewed stress on consumer law compliance since the CFPB released the outline of the Proposed Rules. *Id.* at 32,862–63. Thus, this exemplifies how potential exposure to class action results in companies taking steps to ensure they are acting in the bounds of the law. *See id.* (noting that companies take affirmative steps to limit liability when class litigation is a threat).

³⁴ See Arbitration Agreements, 81 Fed. Reg. at 32,862–63 (stating that companies have less of an incentive to comply with the law absent class action); Barnes, *supra* note 2, at 333 (highlighting that class actions deter wrongful activity); Bolin, *supra* note 31, at 576 (discussing the deterrent value of class action lawsuits).

³⁵ See Sternlight, *supra* note 3, at 8, 29–31 (highlighting that class action has been important in serving public policy interests); *Fresh Air*, *supra* note 31 (finding that class action is important in addressing systemic issues).

³⁶ See Consent Decree, *Gonzalez v. Abercrombie & Fitch Stores*, Nos. 03-2817 SI, 04-4730, and 04-4731 (N.D. Cal. 2005) (ordering Abercrombie & Fitch to end racial and gender discrimination in its stores after a successful class action lawsuit); Joanne Doroshow, *Fact Sheet: Class Actions Are Critical to Remedy Workplace Racial Discrimination*, AM. ASS'N FOR JUST.: FIGHTING FOR JUST. BLOG (Oct. 24, 2014), <https://www.justice.org/blog/fact-sheet-class-actions-are-critical-remedy-workplace-racial-discrimination> [<https://perma.cc/AS49-X227>] (highlighting class action's importance in systemic discrimination cases); *Fresh Air*, *supra* note 31 (explaining that class action is a vital tool for dealing with systemic issues such as wage theft).

³⁷ See Barnes, *supra* note 2, at 333 (discussing the important policy implications of a class action lawsuit); Bolin, *supra* note 31, at 576 (finding class action lawsuits an important private cause of

C. Class Action and the Question of Arbitrability

Although a party has the opportunity to bring forth a class action case when litigating, the same cannot be said for an arbitration proceeding, where the rules are derived from the contract between the parties rather than the FRCP.³⁸ Thus, class action may not be an available course of action if it is not included in the contract's arbitration clause.³⁹ Whether an arbitration clause includes the availability of class action is often ambiguous and thus becomes a question that must be answered by a neutral decisionmaker.⁴⁰ Whether this neutral decisionmaker should be a court or an arbitrator, however, is unclear, and implicates the question of arbitrability analysis.⁴¹ If the availability of class action is a question of arbitrability it is within the court's realm; however, if it is a question of procedure it is for the arbitrator to decide.⁴²

Until recently, the availability of class arbitration was implicitly a question of arbitrability.⁴³ That is, courts answered the question of class availability without initially addressing whether it was in their jurisdiction to decide.⁴⁴

action); *Fresh Air*, *supra* note 31 (explaining class action's importance in cases concerning systemic discrimination).

³⁸ See *Opalinski III*, 761 F.3d at 335 (quoting *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 178 (3d Cir. 2010)) (stating that arbitration is a creature of contract and thus the rules must be delineated in the text). Attempts to argue that Rule 81(b)(6) allows parties to incorporate Rule 23 have been unsuccessful. See *Deiulemar Compagnia di Navigazione S.p.A v. M/V Allegra*, 198 F.3d 473, 482–83 (4th Cir. 1999) (holding that Rule 81(a)(3), now amended as Rule 81(b)(6), cannot be used to implement Rule 23 for class action arbitration); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275–77 (7th Cir. 1995) (holding that Rule 81(b)(6) is not sufficient to incorporate Rule 23 concerning class action arbitration). See generally FED. R. CIV. P. 23, 81 (allowing parties to fill in procedural gaps left open by the FAA). Rule 81(a)(3) allows the Federal Rules of Civil Procedure to apply in arbitration proceedings if the procedural matter is not provided in the statute. See *id.* at 81(b)(6). The courts, however, have held that the FAA does not leave a procedural gap for class action. *Allegra*, 198 F.3d at 482–83; *Champ*, 55 F.3d at 275–77.

³⁹ See *Stolt-Nielson*, 559 U.S. at 687 (holding that companies cannot be compelled into class action arbitration when the agreement is silent on the issue).

⁴⁰ See *Bazze*, 539 U.S. at 452 (plurality opinion) (exemplifying that the two parties had different opinions on class action arbitration and thus that the question needed to be decided by a neutral party); *Opalinski III*, 761 F.3d at 331–32 (demonstrating the starkly different opinions on the availability of class action, and thus the need for a neutral party to decide the question).

⁴¹ *Opalinski III*, 761 F.3d at 331–32; see Martin Saunders, *Class Arbitration—Who Decides?*, NAT'L L. REV. (Sept. 2, 2014), <http://www.natlawreview.com/article/class-arbitration-who-decides> [https://perma.cc/DKK8-QJ8Z] (discussing the dispute of “who decides” in class action availability).

⁴² See *Bazze*, 539 U.S. at 452 (plurality opinion) (exemplifying that when the court finds the question one of procedure, it is for the arbitrator to decide); Saunders, *supra* note 41 (discussing the “who decides” question).

⁴³ See, e.g., *Champ*, 55 F.3d at 271 (deciding the question of class arbitration, and therefore assuming the matter as a question of arbitrability); Deruelle & Berman, *supra* note 23, at 2 (stating that the availability of class action used to be a question of arbitrability). The courts did not explicitly discuss the question of arbitrability in class action availability cases. *Champ*, 55 F.3d at 27. Instead, by addressing the substantive issue, it was implicit that it was a gateway question for the courts. See *id.* (demonstrating the court deciding class action availability).

When tasked with the issue, almost all federal circuits adopted a broad interpretation of the FAA and held that a party was precluded from consolidating claims if the arbitration clause was silent on the issue.⁴⁵ Courts reasoned that the FAA's policy of arbitral efficiency required a literal construction of arbitration clauses.⁴⁶ Therefore, if class action or consolidating claims was not explicitly mentioned, there was no basis to find it was available.⁴⁷ This broad interpretation of the FAA resulted in the statute preempting a wide array of state law.⁴⁸

In 2003, however, in *Green Tree Financial Corp. v. Bazzle*, a plurality of the U.S. Supreme Court determined that the availability of class action was actually a question of procedure and thus within the arbitrator's jurisdiction.⁴⁹

⁴⁴ See, e.g., *Champ*, 55 F.3d at 275 (addressing class arbitration without first discussing the "who decides" analysis); Deruelle & Berman, *supra* note 23, at 2 (stating that the class action availability used to be a question of arbitrability).

⁴⁵ Compare *Herrington v. Union Planters Bank, N.A.*, 265 F.3d 1059, 1060 (5th Cir. 2001) (affirming a lower court's decision that a class action waiver was enforceable), and *Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 728–29 (8th Cir. 2001) (holding that an arbitration clause does not permit class action because there was no explicit provision for arbitration as a class), and *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) (holding a class action waiver enforceable because there was no statutory language or legislative history evidencing that Congress intended for claims not to be arbitrated), and *Allegra*, 198 F.3d at 483 (holding that class action was unavailable because the FAA did not leave any procedural gaps, thus precluding the usage of Rule 81(b)(6)), and *Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264, 268 (2d Cir. 1999) (holding that a joining hearing was not permissible where nothing in the terms of the arbitration agreements provided for a joint hearing), and *Champ*, 55 F.3d at 275 (holding that class action was not available because the arbitration agreement was silent on the matter), and *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) (holding that consolidating proceedings is invalid because the arbitration agreement was silent on consolidation), and *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (holding that the court was without power to consolidate proceedings because the arbitration agreement did not mention consolidation), and *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984) (holding parties could not consolidate claims because the arbitration agreement was silent on the matter), with *New England Energy Inc., v. Keystone Shipping Co.*, 855 F.2d 1, 5 (1st Cir. 1988) (holding that the court could consolidate claims despite the arbitration agreement's silence regarding consolidation). See generally Deruelle & Berman, *supra* note 23 (providing a summary of federal decisions concerning the availability of class action arbitration).

⁴⁶ See, e.g., *Champ*, 55 F.3d at 275 ("The FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter."); Deruelle & Berman, *supra* note 23, at 2 (stating that federal courts' reasoned that they lack authority to read into silence in arbitration agreements).

⁴⁷ *Champ*, 55 F.3d at 275.

⁴⁸ See *Concepcion*, 563 U.S. at 352 (preempting a common law test adopted by California that invalidated class action waivers in certain contracts); Cole, *supra* note 5, at 272–73 (stating that the Supreme Court's FAA doctrine preempts state regulation or judicial decisions). Most notably, in *AT&T Mobility LLC v. Concepcion*, the Supreme Court invalidated California's common law "Discover Bank" test. 563 U.S. at 352; *Discover Bank v. Superior Court*, 113 P.3d 1100, 1116 (Cal. 2009). The invalidation of the *Discover Bank* test sent shockwaves through the consumer protection community. See, e.g., Cole, *supra* note 5, at 272–73.

⁴⁹ *Bazzle*, 539 U.S. at 452–53 (plurality opinion).

The plurality explained that this issue concerned the “kind of arbitration proceeding” rather than a gateway question concerning the agreement’s scope.⁵⁰ Yet decisions post-*Bazze* cast doubt on this opinion, and the Court explicitly stated in subsequent cases that the *Bazze* plurality was not binding.⁵¹ Thus, there is currently a consensus that the Court has not directly decided whether the availability of class action is a question of arbitrability or procedure.⁵²

II. THE THIRD CIRCUIT AND THE QUESTION OF ARBITRABILITY

Although the U.S. Supreme Court has not reached a conclusion, the U.S. Court of Appeals for the Third Circuit recently issued two opinions addressing the topic.⁵³ In 2014, in *Opalinski v. Robert Half International Inc.* (“*Opalinski III*”), the Third Circuit held that class arbitration was a question of arbitrability unless there is a clear and unmistakable delegation to the arbitrators.⁵⁴ Subsequently, in 2016, the Third Circuit cemented and clarified the “clear and unmistakable” standard in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC* (“*Chesapeake III*”).⁵⁵ Part A of this Section discusses the *Opalinski III* decision and the *Chesapeake III* case history.⁵⁶ Part B discusses the *Chesapeake III* decision in the Third Circuit.⁵⁷

A. The Third Circuit Decides Class Action Is a “Question of Arbitrability,” but Leaves Lines Hazy

In *Opalinski III*, the Third Circuit confronted the question of who decides the availability of class arbitration.⁵⁸ In April of 2010, employees of Robert House International filed a class action lawsuit, claiming their employer had failed to pay them overtime pursuant to the Fair Labor Standards Act.⁵⁹ The employment contract, however, contained an arbitration clause and therefore

⁵⁰ *Id.* at 452.

⁵¹ See *Stolt-Neilson*, 559 U.S. at 680 (stating that only a plurality decided *Green Tree Financial Corp. v. Bazze* and thus class action availability is still an undecided question); see also *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013) (stating that *Stolt-Neilson S.A. v. AnimalFeeds Int’l Corp.* made it clear that class arbitration as a question of arbitrability is still undecided).

⁵² *Stolt-Neilson*, 559 U.S. at 680; *Opalinski III*, 761 F.3d at 331.

⁵³ *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC (Chesapeake III)*, 809 F.3d 746, 753 (3d Cir. 2016); *Opalinski v. Robert Half Int’l Inc. (Opalinski III)*, 761 F.3d 329, 330 (3d Cir. 2014), cert. denied, 135 S. Ct. 1530 (2015).

⁵⁴ *Opalinski III*, 761 F.3d at 335.

⁵⁵ *Chesapeake III*, 809 F.3d at 766.

⁵⁶ See *infra* notes 58–80 and accompanying text.

⁵⁷ See *infra* notes 81–95 and accompanying text.

⁵⁸ *Opalinski III*, 761 F.3d at 335.

⁵⁹ 29 U.S.C. § 207 (2012); See *Opalinski v. Robert Half Int’l Inc. (Opalinski I)*, No. 10-CV-2069, 2011 WL 4729009, at *1 (D.N.J. Oct. 6, 2011).

the parties were compelled to arbitrate.⁶⁰ The arbitration clause was silent regarding class action, and thus as a preliminary matter, the arbitrators decided that employees could proceed through class action.⁶¹ The employer immediately sought to vacate the arbitrator's decision, claiming that it was not within the panel's authority to decide the availability of class arbitration.⁶² Thus, the Third Circuit was faced with a question similar to that in *Green Tree Financial Corp. v. Bazzle*—was the availability of class action a question of arbitrability and thus within the court's realm to decide?⁶³ The Third Circuit ultimately held that the availability of class action *was* a question of arbitrability unless the contract clearly and unmistakably provided otherwise.⁶⁴ The Third Circuit explained that bilateral arbitration and class action are distinct proceedings; bilateral arbitration has a presumption of privacy and confidentiality, but class action adjudicates far more and the stakes are much higher.⁶⁵ Thus, class action changes the type of controversy submitted to arbitration and the parties involved, making it a gateway question.⁶⁶ *Opalinski III* therefore clarified the “who decides” question for the Third Circuit, but it still remained unclear what exactly would constitute a “clear and unmistakable” delegation to the arbitrator.⁶⁷ The court confronted this issue in *Chesapeake III*.⁶⁸

In *Chesapeake III*, the Third Circuit was tasked with interpreting an arbitration clause between lessor, Scout Petroleum, and lessee, Chesapeake Appalachia.⁶⁹ In 2008, Chesapeake entered into oil and gas leases with several Pennsylvania landowners, and Scout Petroleum later bought the rights to a

⁶⁰ *Opalinski I*, 2011 WL 4729009, at *2, *8.

⁶¹ See *Opalinski v. Robert Half Int'l Inc. (Opalinski II)*, No. 10-CV-2069, 2012 WL 6026674, at *1 (D.N.J. Dec. 3, 2012).

⁶² *Opalinski II*, 2012 WL 6026674, at *1. The District Court found that it could not overturn the arbitrator's decision, as it had little authority to interrupt arbitral awards. *Id.* The employer then appealed the District Court's decision to the U.S. Court of Appeals for the Third Circuit. *Opalinski III*, 761 F.3d at 329.

⁶³ See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003) (plurality opinion); *Opalinski III*, 761 F.3d at 331–32.

⁶⁴ *Opalinski III*, 761 F.3d at 335. In other words, a clear and unmistakable delegation to the arbitrators allows the arbitrators to decide questions of arbitrability. *Id.*

⁶⁵ See *id.* at 333–34. (reasoning that the distinctions between class and bilateral arbitration lead to the conclusion that class arbitration is a question for the courts).

⁶⁶ *Id.* Specifically, it was a gateway question because it was a matter of the clause's scope. *Id.* The *Opalinski III* court relied on recent dicta from the Supreme Court stating that bilateral and class arbitration are starkly different types of proceedings. *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686–87 (2010); *Opalinski II*, 761 F.3d at 333 (citing *Stolt-Nielson*, 559 U.S. at 686–87).

⁶⁷ *Opalinski III*, 761 F.3d at 334–35.

⁶⁸ See *Chesapeake III*, 809 F.3d at 753; *Chesapeake Appalachia LLC v. Scout Petroleum LLC (Chesapeake II)*, 73 F. Supp. 3d 488, 490 (M.D. Pa. 2014); *Chesapeake Appalachia LLC v. Scout Petroleum LLC (Chesapeake I)*, No. 4:14-CV-0620, 2014 WL 5370683, at *1 (M.D. Pa. Oct. 16, 2014).

⁶⁹ *Chesapeake III*, 809 F.3d at 748.

number of the leases.⁷⁰ The leases included an arbitration clause providing that all disputes would be determined pursuant to the rules of the American Arbitration Association (“AAA”).⁷¹ In March of 2014, Scout filed a class action arbitration demand with the AAA, claiming that Chesapeake was paying insufficient royalties to Scout and similarly situated lessors.⁷² Chesapeake immediately objected to class arbitration and demanded declaratory and summary judgment in the district court.⁷³ Chesapeake argued that the availability of class action was a question of arbitrability and thus within the court’s jurisdiction.⁷⁴ Before the court responded, the panel of arbitrators released a decision concerning class arbitration and the question of arbitrability.⁷⁵ Although the arbitrators acknowledged the *Opalinski III* decision, they stated that the contract between Chesapeake and Scout *did* clearly and unmistakably authorize the arbitrators to make a decision on class arbitrability.⁷⁶ The arbitrators explained that the AAA’s Supplementary Rules explicitly designated arbitrators to decide class availability, thus meeting the *Opalinski III* standard.⁷⁷

In October 2014, the U.S. District Court for the Middle District of Pennsylvania confronted the issue, vacating the arbitrators’ decision and granting Chesapeake’s motion for summary judgment.⁷⁸ Further, the court denied a motion for reconsideration, and explained that the contract was silent and ambigu-

⁷⁰ *Chesapeake II*, 73 F. Supp. 3d at 491–92.

⁷¹ *Id.* at 492. The clause, relevant in part, explains:

ARBITRATION: In the event of a disagreement between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee’s operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with arbitration shall be borne equally by the Lessor and Lessee.

Id.

⁷² Demand for Arbitration at 6, *Scout Petroleum, LLC v. Chesapeake Appalachia, LLC*, No. 14-115-339-14 (Mar. 17, 2014).

⁷³ *Chesapeake II*, 73 F. Supp. 3d at 490.

⁷⁴ *See id.*

⁷⁵ *See* *Scout Petroleum, LLC v. Chesapeake Appalachia, LLC (Chesapeake Arbitration)*, No. 14-115-339-14, at 6 (Oct. 6, 2014) (Bechtle, Kauffman, Gertner, Arbs.). *But see Chesapeake I*, 2014 WL 5370683, at *1 (stating that the arbitrators also decided that class arbitration was available per the contract).

⁷⁶ *Chesapeake Arbitration*, No. 14-115-339-14, at 6.

⁷⁷ *See id.* at 6–8; *see also* AM. ARBITRATION ASS’N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS ¶ 3, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004129 [<https://perma.cc/B4BA-SRAG>] (providing that “the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class”).

⁷⁸ *Chesapeake I*, 2014 WL 5370683, at *2.

uous as to who decides class arbitration, and thus did not meet the onerous “clear and unmistakable” burden.⁷⁹ Scout appealed to the Third Circuit.⁸⁰

B. The Third Circuit Returns to the “Who Decides” Question, and Imposes Burden on Consumers and Employees

In *Chesapeake III*, the Third Circuit was tasked with deciding whether an incorporation of the AAA’s rules—whose Supplementary Rules delegate to arbitrators the responsibility of deciding class availability—clearly and unmistakably delegated the issue of class availability to the arbitrators.⁸¹ Ultimately, the court disagreed with Scout’s argument that an incorporation of the AAA met this clear and unmistakable burden.⁸² Instead, the Third Circuit held that the language of the leases, the nature and rules of the AAA, and case law led to the conclusion that there was no clear and unmistakable delegation to the arbitrators.⁸³

First, in regard to language of the leases, the court stated that the mere inclusion of the AAA was not sufficient without a further specific reference to class arbitration.⁸⁴ Although no specific incantation was necessary, the court highlighted that a lack of reference to the Supplementary Rules specifically or the availability of class action made it extremely difficult for Scout to meet its onerous burden.⁸⁵ Additionally, the court found it important that the leases contained singular terms to describe dispute resolution and that this demonstrated intent to arbitrate bilaterally.⁸⁶ Second, the court explained that the Supplementary Rules, alone, are not enough to trigger class arbitration.⁸⁷ Us-

⁷⁹ *Chesapeake II*, 73 F. Supp. 3d at 501. Although the District Court found that class action was a question of arbitrability, it did not answer the subsequent question—whether the parties could proceed to class arbitration. *Id.* at 502.

⁸⁰ *Chesapeake III*, 809 F.3d at 752.

⁸¹ *Id.* at 748.

⁸² *Id.* According to the court, Scout argued that

(1) the Leases expressly state that the arbitration will be conducted in accordance with the rules of the American Arbitration Association; (2) under Pennsylvania law, the arbitration clause incorporates all the AAA rules into the Leases, which are part of the parties’ agreement as if fully printed *in haec verba* therein; and (3) the Commercial and Supplementary Rules, as integral parts of the Leases, thereby clearly and unmistakably vest the arbitrators with the jurisdiction to decide the question of class arbitrability.

Id. at 753–54 (internal quotations and citation omitted); *see also* AM. ARBITRATION ASS’N, *supra* note 77, ¶ 3 (providing that the arbitrator shall determine whether class arbitration is available as a threshold matter).

⁸³ *Chesapeake III*, 809 F.3d at 754.

⁸⁴ *Id.* at 758.

⁸⁵ *Id.*

⁸⁶ *Id.* at 759–60. The lease stated that all disputes between a “Lessor” and “Lessee” concerning the “Lease” would be resolved in arbitration. *Id.* at 760.

⁸⁷ *Id.* at 762–63.

ing a “daisy chain” of cross-references, the court explained that an incorporation of the AAA does not necessarily mean that the parties consented to an incorporation of the Supplementary Rules.⁸⁸ Finally, although the Third Circuit acknowledged that there was case law supporting the conclusion that an AAA incorporation constitutes a clear and unmistakable delegation of gateway questions to arbitrators, these cases all concerned bilateral arbitrations.⁸⁹ The court explained that bilateral arbitration case law is not influential in the context of class arbitrability due to the stark differences between class and bilateral proceedings.⁹⁰

The Third Circuit also gave weight to a U.S. Court of Appeals for the Sixth Circuit decision that found that incorporating the AAA rules was not a clear and unmistakable delegation to the arbitrators.⁹¹ In 2012, in *Reed Elsevier, Inc. v. Crockett*, the Sixth Circuit explained that without a reference to class arbitration, it was within the court’s realm to decide class arbitrability.⁹² Influenced by the *Crockett* decision, the Third Circuit stated they saw no compelling reason to disregard the Sixth Circuit’s decision.⁹³

Consequently, the arbitration clause at issue in *Chesapeake III* did not “clearly and unmistakably” delegate the availability of class action to arbitra-

⁸⁸ *Id.* The court explained that the “daisy chain of cross references” starts with the lease, and goes to the AAA Rules, and to the Commercial Rules. *Id.* There is no mention of the Supplementary Rules in the Commercial Rules and therefore the “daisy chain” of cross-references. *Id.*

⁸⁹ *Id.* at 763–64; see also *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074–75 (9th Cir. 2013) (holding that an incorporation of the United Nations’ arbitration rules is a clear and unmistakable delegation to the arbitrators, as long as the parties as sophisticated to commercial contracts); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (holding that incorporating Rule 7(a) of the AAA provides clear and unmistakable delegation to the arbitrators); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (holding that a general incorporation of the AAA clearly and unmistakably delegates the question of arbitrability to the arbitrators).

⁹⁰ *Chesapeake III*, 809 F.3d at 764.

⁹¹ *Id.* at 765–66; *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013). The contract in question had an arbitration agreement that incorporated the AAA but did not make specific mention of the Supplementary Rules. *Crockett*, 734 F.3d at 599. Analyzing case law, the U.S. Court of Appeals for the Sixth Circuit first found that class arbitration was a question of arbitrability, unless clearly and unmistakably otherwise. *Id.* at 598–99 (noting that “for recently the Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question rather than a subsidiary one”). The court then found that the arbitration clause did not clearly and unmistakably provide otherwise because there was no reference to class arbitration in the contract. *Id.* at 597, 599.

⁹² *Crockett*, 734 F.3d at 599–600. Once deciding that it was within their jurisdiction, the court used similar reasoning to find that class arbitration was not available. *Id.* The court explained that class arbitration was not mentioned within the contract and thus they could not read into silence. *Id.* The court was influenced by the Supreme Court’s reasoning in *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*; an agreement to arbitrate does not mean that the parties agreed to arbitrate through a class. *Stolt-Nielson*, 559 U.S. at 685; *Crockett*, 734 F.3d at 600.

⁹³ *Chesapeake III*, 809 F.3d at 766. Thus, the Court saw no strong compulsion to create a circuit split, especially after they had joined the U.S. Court of Appeals for the Sixth Circuit in holding that class arbitration was a question of arbitrability. *Id.*

tors.⁹⁴ Thus, the question would be subjected to the courts and their precedent, where the same silence used to conclude there was no delegation to arbitrators would likely be constructed to find class action unavailable.⁹⁵

III. THE IMPLICATIONS OF CHESAPEAKE III: UNEVEN BARGAINING POWER IMPEDES CONSUMERS' AND EMPLOYEES' ABILITIES TO BRING CLASS CLAIMS

The *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC* (“*Chesapeake III*”) decision not only reaffirmed that class action arbitration availability is a question of arbitrability, but also narrowed what language can “clearly and unmistakably” delegate power to the arbitrators.⁹⁶ Post-*Chesapeake III*, an incorporation of the AAA rules is not enough to meet this standard in the Third Circuit.⁹⁷ Rather, it appears that there must be specific language or specific reference within the arbitration clause suggesting it is within the arbitrator’s jurisdiction to decide class action.⁹⁸ Although *Chesapeake III* incentivizes contract clarity, it further hinders parties’ abilities to bring class arbitration claims, because large companies who are often responsible for drafting contracts can choose not to include language invoking class availability, and thereby decline class action opportunities.⁹⁹

As previously discussed, whether a court or an arbitrator has jurisdiction over a matter can affect a case considerably.¹⁰⁰ *Chesapeake III* demonstrated

⁹⁴ *Id.*

⁹⁵ See *Chesapeake II*, 73 F. Supp. 3d at 492 (demonstrating that the arbitration clause was silent as to class arbitration); *supra* note 45 and accompanying text (discussing the precedent that an arbitration clause’s silence on consolidating claims renders the process unavailable).

⁹⁶ *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC (Chesapeake III)*, 809 F.3d 746, 751 (3d Cir. 2016) (finding that an incorporation of the AAA rules is not a clear and unmistakable delegation to the arbiters).

⁹⁷ *Id.* at 762.

⁹⁸ *Id.* at 759.

⁹⁹ See *id.* at 758–59 (incentivizing contract clarity by stating a party’s onerous burden will not be met without some sort of reference to arbitrators); Barnes, *supra* note 2, at 336 (demonstrating that consumers and employees have little to no bargaining power vis-à-vis the corporation); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1037 (1996) (arguing that employees are rarely in a position to negotiate the terms of an arbitration agreement and rather are presented with a “take it or leave it” situation).

¹⁰⁰ See *Opalinski v. Robert Half Int’l Inc. (Opalinski II)*, No. 10-CV-2069, 2012 WL 6026674, at *1 (D.N.J. Dec. 3, 2012) (demonstrating a situation where the arbitrators decided that class action was available in an arbitration clause silent on the matter); Maltby, *supra* note 24, at 49 (underscoring the potential difference of outcomes that result from a case going to a court or an arbitration panel); *Where Flexibility Meets Cost Efficiency in Settling Disputes*, *supra* note 24 (highlighting the different factors that arbitrators and courts weigh when coming to a decision). As previously stated, courts are bound by case law and legal doctrine, whereas arbitrators are able to craft solutions based on their perception of an equitable commercial outcome. *Where Flexibility Meets Cost Efficiency in Settling Disputes*, *supra* note 24. Thus, a court and arbitrator may come to different solutions based on the

that the distinction between arbitration and litigation is especially stark in the context of the availability of class arbitration.¹⁰¹ There is abundant case law finding that class action will not be available when an arbitration clause is silent on the matter.¹⁰² Thus, courts are heavily constrained when considering the availability of class arbitration.¹⁰³ In contrast, arbitrators are not bound by stringent circuit precedent and could find that class action is available if it presents an equitable and fair solution, as did the arbitrators in the *Opalinski* cases.¹⁰⁴ Therefore, there is potential that the courts and arbitrators would interpret the availability of class action quite differently, with large consequences for both company and consumer.¹⁰⁵

The potential difference in interpretation means that parties in an arbitration agreement will likely prefer a different and neutral decisionmaker.¹⁰⁶ Companies, who are generally averse to class action, do not want to leave the matter of class action availability to the uncertainty of an arbitration panel, but rather to the stability and favorable precedent of the judicial branch.¹⁰⁷ On the

same set of facts. See Maltby, *supra* note 24, at 49 (finding that arbiters and courts often come to different decisions on similar cases).

¹⁰¹ See *Chesapeake III*, 809 F.3d at 751 (demonstrating that the parties involved had different opinions as to who should decide class arbitration).

¹⁰² See, e.g., *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) (holding that an arbitration clause's silence on class action rendered the procedure unavailable); *supra* note 45 and accompanying text (discussing federal precedent that class action will not be available to parties in an arbitration agreement where the arbitration clause is silent on the matter).

¹⁰³ See Brunet, *supra* note 24, at 85 (explaining that courts, unlike arbitrators, must follow substantive law); *Where Flexibility Meets Cost Efficiency in Settling Disputes*, *supra* note 24 (explaining that courts are often bound by precedent); *supra* note 45 and accompanying text (discussing federal precedent that class action will not be available to parties in an arbitration agreement where the arbitration clause is silent on the matter).

¹⁰⁴ See *Opalinski II*, 2012 WL 6026674, at *1 (stating that the arbitrators found class arbitration available despite the arbitration clauses' silence on the matter); Brunet, *supra* note 24, at 85 (stating that arbitrators are not bound to substantive law); Weidemaier, *supra* note 24, at 95–97 (stating that arbitrators have more flexibility to make decision); *Where Flexibility Meets Cost Efficiency in Settling Disputes*, *supra* note 24 (explaining the differences between the arbitration and litigation forums). *Chesapeake III* was an intimation of this scenario. 809 F.3d at 751. Although the court gave great weight to *Opalinski II* and Supreme Court dicta when finding that it was within their realm to decide class arbitrability, the arbitration panel interpreted precedent differently. *Id.*

¹⁰⁵ See *Chesapeake III*, 809 F.3d at 751 (explaining that the arbitrators believed it was within their jurisdiction to decide the availability of class action, whereas the courts found that this was an incorrect interpretation of precedent); *Opalinski II*, 2012 WL 6026674, at *1; Weidemaier, *supra* note 24, at 95–97 (explaining how arbitrators adopt a more flexible approach than the courts).

¹⁰⁶ See *Chesapeake III*, 809 F.3d at 751 (demonstrating that the parties preferred different neutral decisionmakers); *Opalinski v. Robert Half Int'l Inc. (Opalinski III)*, 761 F.3d 329, 329 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015) (demonstrating that the employees wanted arbitrators to decide class arbitrability, whereas the employer wanted the court to decide class arbitrability).

¹⁰⁷ See *Chesapeake III*, 809 F.3d at 751 (demonstrating how *Chesapeake* filed a declaratory judgment, which sought a judgment declaring that the court decide the class arbitration availability); *Opalinski III*, 761 F.3d at 329 (stating that the company, Roberts Half International, argued that courts must decide class action availability, not arbitrators).

same note, consumers and employees would rather have an arbitrator decide the availability of class action because there is a possibility that the arbitrator would find it an equitable solution.¹⁰⁸

Given that companies hold nearly all of the bargaining power in drafting consumer and employee contracts, they are in a dominating position to control class action availability by refusing to include language that would delegate authority over class availability to arbitrators.¹⁰⁹ Many modern employment and consumer contracts with arbitration clauses are mandatory, meaning they are entirely drafted by companies and then presented to consumers and employees as “take it or leave it.”¹¹⁰ In an age where these contracts are signed to rent a car, watch online television, or setup a cellular telephone plan, most have little choice but to accept.¹¹¹ Further, the lengthy legal jargon of contracts leaves most with little understanding of an agreement’s terms or any rights that they have given up.¹¹² In fact, in the consumer realm, most people do not even realize that they have entered into arbitration agreements and therefore have no understanding of their contracts.¹¹³ Thus, the extremely uneven bargaining

¹⁰⁸ See *Opalinski III*, 761 F.3d at 334 (demonstrating a situation where the arbitrators decided class action was available and the Third Circuit ultimately reversed the panel’s decision); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599–600 (6th Cir. 2013) (exemplifying that the consumer believed class action should be considered a question of procedure and thus for the arbitrators to decide). This is not to say that arbitrators are pro-class action. See generally Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189 (1997) (highlighting the advantages corporations have over consumers and employees when a matter proceeds to arbitration). In the case of class action availability, however, arbitrators seem to present better opportunities for consumers than the courts. See *Crockett*, 734 F.3d at 599–600 (demonstrating that once the court found class action was a question of arbitrability and thus within their jurisdiction, they almost simultaneously decided class action would not be available).

¹⁰⁹ See *Barnes*, *supra* note 2, at 336 (highlighting that consumers and employees have a dearth of bargaining power in arbitration agreements with companies); Nicole F. Munro & Peter L. Cockrell, *Drafting Arbitration Agreements: A Practitioner’s Guide for Consumer Credit Contracts*, 8 J. BUS. & TECH. L. 363, 376–77 (2013) (explaining the mechanism for drafting a strong arbitration clause precluding class action that can also withhold challenges in court); Van Wezel Stone, *supra* note 99, at 1037 (arguing that employees are rarely in a position to negotiate the terms of an arbitration agreement and rather are presented with a “take it or leave it” situation).

¹¹⁰ *Barnes*, *supra* note 2, at 336; Van Wezel Stone, *supra* note 99, at 1037.

¹¹¹ See CONSUMER FIN. PROT. BUREAU, *supra* note 1, § 2.3, at 7 (detailing how pervasive arbitration clauses are in consumer contracts); *Barnes*, *supra* note 2, at 336 (stating that many arbitration agreements are contracts of adhesion). For example, one study found that 99.9% of the cellphone market use arbitration clauses in their contract. CONSUMER FIN. PROT. BUREAU, *supra* note 1, § 2.3, at 7.

¹¹² See CONSUMER FIN. PROT. BUREAU, *supra* note 1, § 3.4.3, at 21 (finding that many consumers do not understand the substance of their credit card contracts). The CFPB study found that 78.8% of consumers in credit card agreements did not know whether they could sue their credit card issuer in court. *Id.* Further, the study found that over half of the respondents subject to arbitration clauses falsely believed they could bring class action claim. *Id.* at 24.

¹¹³ See *id.* § 3.2, at 8 (citing a study where 87% of respondents said they had never entered a consumer contract with an arbitration clause, when in reality they had entered into at least one consumer contract with an arbitration clause).

power between companies and the average citizen allows companies to control terms, including class action availability.¹¹⁴

That companies are both drafting the contracts and averse to class action makes it highly unlikely they would include the necessary language to “clearly and unmistakably” delegate arbitrators the power to decide class action availability.¹¹⁵ Thus, the *Chesapeake III* holding further insulates companies from class action because of companies’ control over contractual terms.¹¹⁶ Without bargaining power to alter the conditions of the contract, average consumers and employees are left with scarce options when fighting for the ability to pursue a class arbitration claim.¹¹⁷

As a result of class arbitration restrictions, many consumers and employees have been unable or unwilling to bring forth claims against companies, as bilateral arbitration can be expensive and impractical.¹¹⁸ This is exacerbated by the fact many lawyers are unwilling to provide their services because the claims, and thus potential rewards, are quite small on a bilateral level.¹¹⁹ Although some claim that the restrictions are necessary to adhere to the FAA policies, class action advocates argue that the average citizen is losing his day in court.¹²⁰ Either way, it is clear that companies have saved millions, if not billions, of dollars by restricting such claims.¹²¹ In sum, by cementing *Opalinski v. Robert Half International Inc.* (“*Opalinski III*”) and narrowing the meaning

¹¹⁴ See *id.* (demonstrating the uneven bargaining power by stating that many consumers do not realize they have entered arbitration agreements); Barnes, *supra* note 2, at 336 (stating that pre-dispute clauses are contracts of adhesion); Van Wezel Stone, *supra* note 99, at 1037 (explaining that many employee contracts are presented as “take it or leave it”).

¹¹⁵ See Barnes, *supra* note 2, at 336 (highlighting the uneven bargaining power in arbitration agreements); Silver-Greenberg & Gebeloff, *supra* note 1 (demonstrating that many consumers and employees are finding themselves unable to redress claims against companies because they are precluded from class arbitration).

¹¹⁶ See *Chesapeake III*, 809 F.3d at 758 (stating that without a specific incantation or reference to class arbitration, it will be quite difficult to meet the “clear and unmistakable” burden).

¹¹⁷ See CONSUMER FIN. PROT. BUREAU, *supra* note 1, § 1.4.1, at 11 (finding that only 616 cases were filed with the AAA between 2010–2012); Barnes, *supra* note 2, at 336 (claiming that consumers and employees have very little bargaining power vis-à-vis); Silver-Greenberg & Gebeloff, *supra* note 1 (detailing the struggles many consumers face when attempting to arbitrate bilaterally).

¹¹⁸ CONSUMER FIN. PROT. BUREAU, *supra* note 1, § 1.4.1, at 11; Barnes, *supra* note 2, at 336; Silver-Greenberg & Gebeloff, *supra* note 1. For example, in five years, Verizon faced 65 consumer arbitrations out of its 125 million subscribers. Silver-Greenberg & Gebeloff, *supra* note 1.

¹¹⁹ See *Amchen Prods, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (explaining that lawyers are less likely to take cases when the rewards are smaller and therefore class action is an important tool in garnering legal support); Barnes, *supra* note 2, at 333 (highlighting that in certain cases, the cost of proving damages is much more expensive than any recovery, and thus no client or lawyer would take the case individually).

¹²⁰ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (explaining that “requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA”); CONSUMER FIN. PROT. BUREAU, *supra* note 1, § 1.4.1, at 11; Barnes, *supra* note 2, at 329; Silver-Greenberg & Gebeloff, *supra* note 1.

¹²¹ Rice, *supra* note 6, at 248; Silver-Greenberg & Gebeloff, *supra* note 1.

of “clear and unmistakable” delegation to arbitrators, *Chesapeake III* has made it much more difficult for class action availability to be decided by arbitrators, which further inhibits the possibility of class action arbitration.¹²²

CONCLUSION

Although arbitration is an efficient dispute resolution system, its current class action restrictions present a serious danger to citizens’ Due Process Rights. Consumers and employees, stuck in arbitration agreements that preclude class arbitration, are finding themselves unable to effectively redress their legal claims. Although the *Chesapeake III* decision incentivizes contract clarity, it ignores the uneven bargaining powers in arbitration agreements. Thus, companies and employers, unlikely to add the “clear and unmistakable” language in their arbitration contracts, have become even further insulated from class action demands.

CAITLIN TOTO

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¹²² See *supra* notes 96–121 and accompanying text (discussing the implications of the *Chesapeake III* decision with regards to class action arbitration).